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No. 84-681

In the Supreme Court of the United States

OCTOBER TERM, 1984

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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QUESTIONS PRESENTED

1. Whether an award of liquidated damages under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, requires proof of a specific intent to violate the Act.

2. Whether the good faith defense available under the Portal-to-Portal Act of 1947, 29 U.S.C. 260, is also available under the ADEA.

3. Whether an award of damages for future economic loss in lieu of reinstatement is authorized under the ADEA.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 741 F.2d 1225. The district court did not issue an opinion.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1984. A petition for a writ of certiorari was filed on October 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Equal Employment Opportunity Commission (EEOC) filed this action pursuant to Section 7(b) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 626(b), alleging that petitioner, Prudential Federal Savings

and Loan Association, violated the ADEA, 29 U.S.C. 621 *et seq.*, by discharging several employees (Pet. App. A1). The case was tried to a jury in September 1982. The jury returned a verdict finding that petitioner had discriminated against Douglas Tanner by discharging him because of his age (*ibid.*).[1] The jury awarded Tanner $34,200 in past lost wages and benefits. Section 7(b) of the ADEA provides for the award of an additional equal amount as liquidated damages for willful violations;[2] the jury, after being instructed that a willful violation occurs only if there is a specific intent to violate the Act, awarded no liquidated damages (Pet. App. A14). On November 9, 1982, the district court entered judgment on the jury verdict. In addition to the award of backpay, the court granted Tanner $17,000 as equitable relief in lieu of reinstatement to compensate him for "lost retirement and pension benefits accruing through normal retirement" (Judgment of Nov. 9, 1982; Pet. App. A8).

Both parties appealed. The EEOC challenged the district court's instructions to the jury concerning the standard for the imposition of liquidated damages, while petitioner challenged, inter alia, the equitable award to compensate Tanner for lost future retirement and pension benefits. The court of appeals agreed with the EEOC that the district court "imposed too strict a standard [for a willful violation under § 7(b)] by requiring proof that the employer specifically intended to violate the law" (Pet. App. A14). The court held that " '[a] violation may be willful even if an employer does not have specific knowledge that his actions violate the Act [so long as] the employer was, or should have been,

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[1]The EEOC's complaint was brought on behalf of six other individuals as well. The jury found that they had suffered no discrimination, and the Commission did not challenge that determination on appeal (Pet. App. A1).

[2]See 29 U.S.C. 216.

cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions' " (Pet. App. A15, quoting *Donovan* v. *Simmons Petroleum Corp.*, 725 F.2d 83, 85 (10th Cir. 1983) (emphasis omitted). The court also held that the ADEA did not incorporate Section 11 of the Portal-to-Portal Act, 29 U.S.C. 260, which authorizes courts to exercise discretion to deny or reduce liquidated damages under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, where an employer demonstrates its good faith (Pet. App. A16). Since there was evidence, which petitioner did not dispute, of petitioner's awareness of the ADEA's applicability to its employees, the court held that petitioner's discharge of Tanner because of his age was willful within the meaning of the ADEA and that he was therefore entitled to liquidated damages (Pet. App. A15-A17).

With respect to the district court's award of future pension benefits in lieu of reinstatement, the court concluded that, while reinstatement is the preferred remedy under the Act, a monetary award of future damages may be necessary to achieve the Act's "make-whole" purpose if the employer has exhibited such extreme hostility that reinstatement of the victimized employee is impossible (Pet. App. A11). Noting that there was evidence showing that petitioner's hostile attitude precluded reinstatement of Tanner (Pet. App. A13), the court nonetheless directed the district court on remand to reconsider its award of future damages, and "to articulate the evidence and rationale underlying its decision" (*ibid.*).

Judge Barrett dissented from the determination that future damages can be awarded under the ADEA, since he concluded that such damages are too speculative (Pet. App. A17-A18).

ARGUMENT

1. The question of the standard to be applied in awarding liquidated damages under Section 7(b) of the ADEA, 29 U.S.C. 626(b), is currently before this Court in *Trans World Airlines, Inc. (TWA)* v. *Thurston*, No. 83-997 (argued Oct. 10, 1984). For the reasons explained in our brief in that case,[3] we submit that the court below correctly concluded that where an employer intentionally discriminates on the basis of age, its violation is willful if it knew or should have known that its actions were governed by the Act. This Court may, however, wish to hold the petition for certiorari pending its decision in *TWA* v. *Thurston, supra.*

The other issues raised by petitioner do not merit review by this Court.

2. Section 7(b) of the ADEA specifically provides "[t]hat liquidated damages shall be payable only in cases of willful violations of this [Act]." Although the statute thus contains a specific standard for the award of liquidated damages, petitioner argues that Section 11 of the Portal-to-Portal Act, 29 U.S.C. 260, also applies. Section 11, which modifies the otherwise mandatory requirement of liquidated damages for FLSA violations, authorizes the district court in its discretion to reduce or deny liquidated damages where an employer demonstrates that he has acted "in good faith and that he had reasonable grounds for believing that his act or omission was not a violation."

Petitioner's contention, which was rejected by the court below, is directly contrary to this Court's analysis of the relationship between the ADEA and the FLSA set forth in

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[3]We are sending petitioner a copy of our brief in *TWA* v. *Thurston*, No. 83-997.

Lorillard v. *Pons*, 434 U.S. 575 (1978).[4] The conclusion that Section 11's "good faith" provision is not incorporated into the ADEA is also supported by the legislative history of the 1978 amendments to the ADEA. The conference report on those amendments describes liquidated damages as compensating aggrieved individuals for losses arising out of a "willful violation of the ADEA." H.R. Rep. 95-950, 95th Cong., 2d Sess. 13 (1978). The report designates liquidated damages as legal relief, and thereby requires that the factual issues underlying a liquidated damages claim be tried by a jury. *Ibid.* It makes no reference whatsoever to any judicial discretion to deny liquidated damages upon a finding of good faith. As the First Circuit has stated, the amendments thus "highlighted the 'willful' test as the standard for imposing liquidated damages" under the ADEA. *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1020-1021 n.28 (1st Cir. 1979). See also *Rose* v. *National Cash Register Corp.*, 703 F.2d 225, 228 n.2 (6th Cir. 1983).

It is accordingly not surprising that most courts of appeals that have considered the issue since *Lorillard* have agreed with the court below that Section 11 of the Portal-to-Portal Act is not incorporated into the ADEA.[5] The Fifth

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[4]In *Lorillard*, the Court explained that "Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." 434 U.S. at 581. The Court then noted that although Section 11 of the Portal-to-Portal Act modifies the FLSA by authorizing courts to deny liquidated damages where the employer establishes that it acted in good faith, "the ADEA does not make any reference to § 11." 434 U.S. at 582 n.8. Instead, in that Act "Congress altered the circumstances under which [liquidated damages] would be available * * * by *mandating* that such damages be awarded * * * where the violation of the ADEA is willful." 434 U.S. at 581 (emphasis added).

[5]*Rose* v. *National Cash Register Corp.*, 703 F.2d 225, 228-230 (6th Cir. 1983); *Syvock* v. *Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 154 n.4 (7th Cir. 1981); *Goodman* v. *Heublein, Inc.*, 645 F.2d 127, 129-130 (2d

Circuit, the sole court of appeals to reach a contrary result, formulated its rule prior to *Lorillard* and has not specifically considered whether its view withstands *Lorillard's* analysis.[6] It is thus not clear that there is a continuing conflict in the circuits meriting this Court's resolution.[7]

3. The court of appeals held in this case that, although reinstatement of the wrongfully discharged plaintiff is the preferred remedy under the ADEA, a court may award damages for future economic loss in lieu of reinstatement, where reinstatement is not practicable.[8] The court vacated the specific award here, however, and directed the district court to reconsider whether "future damages are more appropriate than reinstatement" in this case (Pet. App. A13). Petitioner contends that the ADEA does not permit

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Cir. 1981); *Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 981-982 (9th Cir. 1981); *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, 279 n.5 (3d Cir. 1980); *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1020 (1st Cir. 1979).

[6]In *Hays* v. *Republic Steel Corp.*, 531 F.2d 1307, 1311-1312 (1976), the Fifth Circuit ruled that the Portal-to-Portal Act is an amendment to the FLSA and that all of its provisions therefore are incorporated in the ADEA. This conclusion overlooks the express terms of the ADEA, and is inconsistent with this Court's recognition in *Lorillard*, 434 U.S. at 582, of the "selectivity that Congress exhibited in incorporating [FLSA] provisions" into the ADEA. While the Fifth Circuit has subsequently applied its rule without further analysis (*Hedrick* v. *Hercules, Inc.*, 658 F.2d 1088, 1096 (1981)), it has also recognized the weight of authority supporting the opposite rule, and in a case involving the reversal of a jury verdict of liability concluded that "the present facts [do not] warrant an inquiry into our established approach to liquidated damage awards" (*Elliott* v. *Group Medical & Surgical Service*, 714 F.2d 556, 558 n.2 (5th Cir. 1983)). The circuit may well be ready to reconsider its approach in an appropriate case.

[7]Moreover, in defining the wilfullness standard in *TWA* v. *Thurston*, *supra*, this Court may provide further guidance to the courts of appeals concerning the relevance of an employer's good faith defense.

[8]The court had earlier held, in *Blim* v. *Western Electric Co.*, 731 F.2d 1473, 1479 (10th Cir. 1984), that the discharged employee's preference for front pay rather than reinstatement does not justify such an award.

the award of future damages. Review by this Court of that issue is inappropriate at this time, because the courts below may determine that future damages are not appropriate under the facts of this case. Moreover, contrary to petitioner's contention, there is no conflict among the circuits on this issue, and the holding of the court of appeals is correct.

a. Several courts of appeals have agreed with the court below that the district courts possess discretionary equitable authority[9] under the ADEA to award monetary damages in lieu of reinstatement, when reinstatement is inappropriate and an award of monetary damages is consequently necessary to make victims of discrimination whole. *Whittlesey* v. *Union Carbide Corp.*, 742 F.2d 724, 727-728 (2d Cir. 1984); *Davis* v. *Combustion Engineering, Inc.* 742 F.2d 916, 922-923 (6th Cir. 1984); *Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir. 1982); *Cancellier* v. *Federated Department Stores*, 672 F.2d 1312, 1319 (9th Cir.), cert. denied, 459 U.S. 859 (1982).

Petitioner bases his claim of conflict (Pet. 12) on dicta in a footnote in *Kolb* v. *Goldring, Inc.*, 694 F.2d 869, 874 n.4 (1st Cir. 1982). In that case, the jury had awarded $45,000 in compensatory damages to plaintiff, who had secured a new job at an identical salary two months after being discharged in violation of the ADEA by defendant, and at the time of trial was earning more than he had with defendant. There was no suggestion that plaintiff had ever sought reinstatement with defendant. In holding that the damage award was excessive, the court calculated plaintiff's damages to the date at which his new salary matched his salary plus fringe benefits at his old job—*i.e.*, when he was in the same economic status in his new job. In passing, the court noted in

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[9]An award of monetary damages in lieu of reinstatement is an exercise of equitable authority. *Loeb* v. *Textron, Inc.*, 600 F.2d at 1022 n.33; Pet. App. A11.

the footnote on which petitioner relies that even if he had not reached that status by the date of judgment, that date would have been the date for the calculation of damages, because "damages are 'settled' on the date of judgment and the plaintiff cannot then recover damages for future economic loss, or 'front pay' even though the injury continues. See *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980) (no future damages where the plaintiff did not seek reinstatement); *Monroe* v. *Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 235 (N.D. Ga. 1971)" (694 F.2d at 874-875 n.4).[10] This off-hand comment, in a case in which it is apparent that no reinstatement was sought, does not present a square conflict in the circuits on the question whether a plaintiff can recover make-whole relief when reinstatement is not feasible; still less does the bare possibility that the First Circuit may take an unusual approach to the front pay issue merit review by this Court of the more usual approach of the decision below.

b. Contrary to petitioner's assertion that "awards of damages [under the ADEA] are limited to those specified in the FLSA" (Pet. 14), Section 7(b) of the ADEA, 29 U.S.C. 626(b), (emphasis added) authorizes courts "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act], *including without limitation*, judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation". Under this broad grant of equitable authority, a court should fashion the most appropriate remedy that ensures

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[10]In *Penn-Dixie* at the cited page the court stated: "money damages in a case under the Age Discrimination Act must be liquidated as of the date of judgment. If the plaintiff does not wish injunctive relief [*i.e.* reinstatement], he waives any unliquidated future rights he might have against his former employer." *Monroe* v. *Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 235 (N.D. Ga. 1971).

that the aggrieved individuals are "made whole," to the greatest extent possible, for their losses due to age discrimination. *Whittlesey* v. *Union Carbide Corp.*, 742 F.2d at 728; *Gibson* v. *Mohawk Rubber Co.*, 695 F.2d at 1097; *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1238 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978).[11]

Ordinarily, a victim of discrimination is made whole by an award of backpay to compensate for wages lost up to the time of judgment, and some form of affirmative relief—usually an order of reinstatement for an individual unlawfully terminated—to place him in the position he would have occupied but for the employer's discriminatory action. See, *e.g.*, *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 364-365 (1977). As the court of appeals here recognized (Pet. App. A11), this form of remedy is preferable because it involves the least amount of uncertainty and it affords the victim of discrimination the very thing he has been unlawfully denied, the opportunity to work on an equal basis with others.

However, an order requiring immediate reinstatement of a victim of discrimination may be impractical or inappropriate because of the employer's subsequent actions. For example, as is apparently the case here, the hostility shown by the employer in the course of the remedial proceedings

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[11]In this respect, the purpose and scope of the ADEA remedy is the same as that of the remedy provided by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763-764 (1976). Numerous courts have awarded front pay or damages in lieu of reinstatement under Title VII. *EEOC* v. *Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 926-927 (S.D.N.Y. 1976), aff'd, 559 F.2d 1203 (2d Cir.), cert. denied, 434 U.S. 920 (1977); *Fitzgerald* v. *Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980); *Hill* v. *Western Electric Co.*, 596 F.2d 99, 104 (4th Cir.), cert. denied, 444 U.S. 929 (1979); *Goss* v. *Exxon Office Systems*, 36 Fair Empl. Prac. Cas. (BNA) 344, 347 (3d Cir. 1984).

may make it impossible, as a practical matter, for the individual to return to his former position. The court of appeals correctly held that, in such cases, a monetary award for future lost economic benefits is an appropriate means of avoiding the frustration of the congressional purpose of making victims of employment discrimination whole.[12]

c. Petitioner argues that because there are uncertainties in assessing future economic damages, there should be a per se rule against such awards (Pet. 15-16.) While the uncertainties involved in making an award of future compensation support the position of the court of appeals that reinstatement is the preferred remedy, they do not justify a rule barring future compensation in all circumstances. See Pet. App. A12.[13]

d. Petitioner also argues that future damages should not be available because the possibility of such awards would encourage victims of discrimination not to obtain new work (Pet. 16).[14] The court of appeals recognized, however, that

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[12]Petitioner errs in asserting (Pet. 16) that the availability of liquidated damage awards precludes awards of future economic damages in ADEA cases. Front pay is awarded in lieu of the equitable remedy of reinstatement. Liquidated damages are awarded in lieu of pre-judgment interest on wrongfully withheld back pay to compensate the employee fully for past pecuniary loss; they also serve as compensation for nonpecuniary damages, such as humiliation and loss of self respect, arising out of a willful ADEA violation. They are thus no substitute for prospective equitable relief. See *Dickerson* v. *Deluxe Check Printers, Inc.*, 703 F.2d 276, 280 (8th Cir. 1983); H.R. Rep. 95-950, 95th Cong., 2d Sess. 14 (1978).

[13]Indeed, as the court of appeals noted, uncertainty is not a genuine concern in this case because the court did not award future wages. It awarded only the present value of pension benefits that Tanner would have received at normal retirement age but for his illegal discharge. Pet. App. A12-A13.

[14]Again, the absence of any award of future wages in this case limits the relevance of this argument to these facts.

trial courts possess discretion to deny awards where there has been a failure to mitigate damages. See Pet. App. A12; *Whittlesey* v. *Union Carbide Corp.*, 742 F.2d at 728.[15]

CONCLUSION

The petition for a writ of certiorari should be held for appropriate disposition in light of this Court's decision in *TWA* v. *Thurston*, No. 83-997. As to the second and third questions presented, the petition should be denied.

Respectfully submitted.

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DECEMBER 1984

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[15]Petitioner argues that Tanner is not entitled to an award of future damages because he did not "genuinely" seek reinstatement. Tanner did, however, request reinstatement (Deposition of EEOC Investigator Marilyn Waahto 47). Moreover, the court of appeals noted that there was evidence in the record indicating that petitioner " 'has steadfastly refused to consider reinstatement as a remedy [and that its] * * * hostile attitude toward its former employees * * * makes reinstatement a virtual impossibility as a remedy' "(Pet. App. A13, quoting EEOC Memorandum). In any event, these conflicting claims simply present factual issues to be determined on remand.

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